

IN THE MATTER OF Merchant Mariner's Document
and All Other Seaman's Documents
Issued to: James Irwin GOULDMAN Z-518 685-D2

Decision on Review

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James Irwin GOULDMAN

This review is taken under 46 CFR 137.35-1(a).

On 13 September 1968, at San Francisco, California, after a charge of misconduct had been found proved in the captioned matter, an Examiner of the United States Coast Guard ordered a suspension of the Merchant Mariner's Document for seven months.

On 2 May 1968, another Examiner at San Francisco, California, had entered an order in another proceeding against the same Document, of three months' suspension plus three months' suspension on twelve months' probation. Appeal was filed from that order.

The Examiner in the instant case was apprized of this earlier order, as part of prior record, and of the fact that an appeal was pending. The order in the instant case reads as follows:

"That Merchant Mariner's Document, Z-518 685-D2, and Temporary Letter dated 3 May 1968, issued by Hearing Examiner Buddress, and all other valid licenses and documents issued to James Irwin Gouldman by the United States Coast Guard or any predecessor authority now held by him, be, and the same are hereby SUSPENDED OUTRIGHT effective immediately upon the service of this Order. The said suspension shall remain in effect until seven months after 13 September 1968. In the event that the pending appeal by the Person Charged from the Order of Examiner Buddress, dated 2 May 1968, is successful, and the Order therein is set aside, then the document of the Person Charged will be returned to him, provided, that the Person Charged has served one month's outright suspension further Ordered by me herein. This Order activates the three month outright suspension and the three months probationary suspension ordered by Hearing Examiner Buddress, effective 2 May 1968." No

appeal was filed from this order.

OPINION

I

The Examiner was properly apprized of the existence of the order dated 2 May 1968, and of the fact that an appeal was pending. The Examiner attempted to tailor his order in the instant cases to the circumstances. A reading of the order set out in full above shows that he did not succeed.

II

Since action on appeal in the earlier case was still pending, the order was not final. In the absence of finality, the party was not, at the time of the offense in the instant case on probation. The three months' suspension on probation could not, therefore, be made effective by the order in the instant case.

Neither could the Examiner in this case make effective, as part of his order, the outright suspension contained in the earlier order.

Under the conditions of this case, an examiner may take cognizance of an earlier order, and tailor his own order to meet contingencies, but he may not incorporate the earlier order in his own or make it effective when the earlier order is on appeal.

III

Since situations such as this do arise, an order which would have been valid and acceptable in the instant case can be stated for guidance:

"That xxx...be suspended, immediately upon service of notice that the order of 2 May 1968, or any part of it, has become final. The suspension herein ordered shall terminate one month after completion of any outright suspension made final as to the order of 2 May 1968. If a Commandant's Decision on Appeal leaves no outright suspension from the order of 2 May 1968, it is ordered that xxx...be suspended upon service of the Commandant's Decision on Appeal, the suspension to terminate one month from the date any outstanding documents or licenses are surrendered to the United States Coast Guard. If this instant order should be appealed, the suspension ordered herein, if affirmed, shall be effective consecutively to,

and not concurrently with, any outright suspension now ordered but on appeal and affirmed."

IV

It can be seen that, should an examiner be so minded, he could use this method to provide for a lesser suspension under his own order if the earlier case were to be expunged from the record.

V

It may also be noted that the considerations in this Opinion do not apply when an examiner orders revocation, unless he would not have ordered revocation without the record of the earlier matter then on appeal.

CONCLUSION

The order of the Examiner clearly intended a one month suspension for the instant offense. The order, otherwise unauthorized, could be upheld as to that one month. Under the circumstances of this case, and in view of the disposition being made of the earlier order of 2 May 1968, there is no good reason insist upon the one month suspension intended.

The findings of the Examiner need not be disturbed, so that the matter herein will still be part of the party's record. The order of the Examiner will be set aside.

ORDER

The findings of the Examiner, made at San Francisco California, on 13 September 1968, are AFFIRMED.

The order of the Examiner, entered at that time and place, insofar as it purported to effectuate the earlier order of 2 May 1968, is invalid. Under the circumstances of this case, since part of the order is invalid, the entire order is set aside.

This order in no way affects the validity of the order of 2 May 1968 or of proceedings thereon.

W. J. SMITH
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this day of 1969.